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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 1088

JOHN B. BAILEY,
Petitioner,
vs.
SANDELL, INC., a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent Sandell, Inc., a corporation, respectfully presents its brief in opposition to Petitioner's Petition for Writ of Certiorari on file with this Court.

PRELIMINARY STATEMENT

In his Petition for a Writ of Certiorari, Petitioner, who was Defendant in the Trial Court, does two things: First (Petition, pp. 8-16), he attempts to base

an argument that there is a question of law concerning the Securities Act of 1933 (15 U.S.C.A. Sect. 77) upon an assertion that the factual question of whether he was an underwriter was decided erroneously by the Trial Court. Secondly (Petition, pp. 16-17), he charges that the Court "rewrote" the agreement between the parties and offers in support of such a contention the false assertion that, "It is conceded by all parties that the clearance was necessary before the note became due . . ." (Petition, p. 17), and the equally false statement that, "The evidence is clear in this case that it was the intention of the parties that before the note could become due that a clearance must be had . . ." (Petition, p. 17). That neither of Petitioner's positions is tenable, and that neither furnishes any ground for review by the Supreme Court of the United States will be hereinafter demonstrated.

ARGUMENT

I.

THERE IS NO QUESTION OF INTERPRETATION OF A FEDERAL STATUTE OR OF THE REGULATIONS OF A FEDERAL AGENCY.

On page 8 of his Petition, Petitioner, after stating that, ". . . the District Court must have found that there was no restriction of any kind . . .", quotes various sections of the Securities Act of 1933 and then argues that Petitioner was at all times an underwriter so that he needed "clearance," whatever that may be, in order to sell his shares of stock pur-

chased by him under the Offering Circular of November 18, 1954, therein referred to.

In the first place, this argument ignores the findings of the Trial Court noted in the Opinion of the District Court of Appeal (Petition, Appendix A, p. vii) that "clearance" was not a condition precedent to payment, but that there was an absolute promise to pay (Finding No. 4, Cl. Tr. p. 93), that the parties merely intended that the reference to granting of "clearance" was to enable the Petitioner to have a reasonable time to assure himself that he could safely sell said stock purchased by him under the November 18, 1954 Offering Circular (Finding No. 5, Cl. Tr. p. 93), and that ninety days after January 15, 1956, was a reasonable time for the securing of such "clearance" (Finding No. 6, Cl. Tr. pp. 93-94).

The foregoing findings made a finding as to the meaning of the word "clearance" unnecessary because it was not a condition precedent to Petitioner's obligation to repay the money he had borrowed. Petitioner, however, chooses to ignore not only this fact, but also to ignore the fact that the District Court of Appeal, in discussing the meaning of the word "clearance", was merely pointing out that even had a finding on the subject been necessary, it could not have helped Petitioner had it been made, for as the District Court of Appeal said in its Opinion (Petition, Appendix A, p. xiv):

> "As to the matter of 'clearance,' if it does exist it would not be required under these facts because of the regulations of the S.E.C., and a

finding would be unnecessary in view of the other findings."

Assuming arguendo, however, that such a finding regarding "clearance" and the various meanings assigned to it by Petitioner were material, this cynical effort of Petitioner to show that he was still an underwriter, after all, is both an improper reargument of the evidence and wholly useless to Petitioner as well. The question of whether one has ceased to be an underwriter is one of fact; in fact, it depends on the purchaser's intent either to buy for investment or for further distribution, which intent is, itself, a question of fact (Loss, Securities Regulations, 2d Ed. 1961, Vol. 1, pp. 551 to 552, 665). True, Petitioner was the underwriter for the issue of 28,750 shares issued under the November 18, 1954 Circular, but he sold all of those shares according to his own statement, and therefore ceased to be an underwriter (Rep. Tr. p. 8, lines 7-11; p. 9, lines 7-11; p. 14, lines 22-24).

In this connection, the following appears in C.C.H. Federal Securities Law Reporter, Para. 2266.03:

> "Transactions by an underwriter are not exempted. It is true, however, that there is a point of time when a person who has become an underwriter ceases to exercise any underwriting functions and *therefore, ceases to be an underwriter.* When that point is reached such a person would be subject only to whatever restrictions would be imposed upon him as a dealer." (House Committee Report No. 85, 73rd Cong., First Session, p. 16 (emphasis ours).

Petitioner testified that he sold all of the 28,750 shares of the issue in question pursuant to the underwriting agreement and, in so doing, purchased some of them for his own account, as he had a right to do under the underwriting agreement (Rep. Tr. p. 9, line 12 to p. 10, line 7). Now, Petitioner says that this is not true, but that he purchased these shares with a view toward further distribution (Petition, p. 12). One can but wonder at this belated statement of secret intent to redistribute, not mentioned to Respondent when Petitioner insisted on putting in a reference to "clearance" in their agreement (Rep. Tr. p. 35, lines 10-13, p. 41, lines 3-19), and not mentioned by Petitioner at the trial of this action. If Petitioner never intended to purchase these shares for investment but only to distribute them as underwriter and dealer, then it is suggested that maybe he should have sold them along with the rest of the 28,750 shares he sold to various persons as such underwriter, including some to Mr. Sandell (Rep. Tr. p. 14, lines 6-24).

None of the cases cited by Petitioner on pages 13 to 16 of his Petition hold that the question of whether one is, or is not, an underwriter is any more than a question of fact, and, therefore, no useful purpose would be served by any further discussion of them here.

The statement on page 16 of the Petition to the effect that the decision of the District Court of Appeal of the State of California is contrary to the Federal cases cited by Petitioner in that it holds that

a person in the position of Petitioner could lawfully sell an unregistered security to the general public without notice to, or consent of, the Securities and Exchange Commission, is a deliberate misstatement of the Opinion of the District Court of Appeal.

The charge that the District Court of Appeal misconstrued the Securities Act of 1933 is not only incorrect, but is immaterial in view of the finding of the Trial Court that clearance was not a condition precedent to payment of the note (Finding No. 4, Cl. Tr. p. 93, lines 12-20).

It is also interesting to note that Petitioner did not wait for any so-called "clearance", but actually sold 1,500 shares issued under the Offering Circular of November 18, 1954, to Mr. Sandell at the price of $10.50 per share (Petition, Appendix A, p. xv; Rep. Tr. p. 39, line 22 to p. 41, line 2).

II.

NEITHER THE TRIAL COURT NOR THE DISTRICT COURT OF APPEAL REWROTE OR OMITTED ANY LANGUAGE FROM THE AGREEMENT OF THE PARTIES; THE TRIAL COURT MERELY INTERPRETED THE AGREEMENT.

Petitioner indicates that the provision for clearance was ignored by the Court. In so stating, Petitioner ignores Finding No. 4 and Finding No. 5, both of which interpret the agreement and make a finding of fact as to the reason why the reference to clearance was inserted in the agreement (Cl. Tr. p. 93, lines 12-28). The Trial Court made it quite clear that the

question of the date of maturity of the note and the question of whether clearance was, or was not, a condition precedent to payment were matters in issue before the Court (Rep. Tr. p. 259, lines 2-23; p. 261, line 22 to p. 265, line 19), and also pointed out at the time that its purpose was to allow counsel every opportunity to be sure of the theory upon which the Court was proceeding (Rep. Tr. p. 267, line 7 to p. 273, line 17).

The interpretation and construction of the agreement and the question of whether or not clearance was necessary before the note became due was at all times an issue before the Court and the contentions in this respect of both parties were stated in the Petitioner's own pre-trial statement (Cl. Tr. p. 67, line 24 to p. 68, line 5).

The briefest of examinations of the foregoing references to the Clerk's and Reporter's Transcripts is a complete answer to the false assertion by Petitioner, on page 17 of his Petition, that all parties conceded that clearance was necessary before the note became due.

As to the statement on that same page by Petitioner that, "The evidence is clear . . .", that it was the intention of the parties that the note could not become due without a clearance being had, is a statement directly contrary to the finding of the Trial Court on that issue of fact (Finding No. 4, Cl. Tr. p. 93, lines 12-20). Petitioner's statement is no more than an improper effort to reargue the evidence in contravention of the universal rule that the only func-

tion of an Appellate Court is to determine whether there is any substantial evidence, contradicted or uncontradicted, which will support a challenged finding. This rule was noted by the District Court of Appeal in its Opinion, with appropriate reference to authorities (Petition, Appendix A, p. viii).

CONCLUSION

It is respectfully submitted that under no theory is there a Federal question involved in this action, and that Petitioner has presented no ground upon which to base its Petition for a review by the Supreme Court of the United States.

Dated, Fresno, California,
May 10, 1963.

Respectfully submitted,
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